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7
8 UNITED STATES BANKRUPTCY COURT

9 NORTHERN DISTRICT OF CALIFORNIA - OAKLAND DIVISION

10 In re

11 ZOE NADINE GARLICK ,

12 Debtor(s).

Case No.11-47682-WJL

Chapter 7

R.S. No. ELL - 347

13 MOTION FOR RELIEF FROM
14 AUTOMATIC STAY
(11 U.S.C. § 362 and Bankruptcy Rule 4001)

15 DATE: November 9, 2011
16 TIME: 10:30 AM
CTRM: 220

17 1300 Clay Street, Suite 300
18 Oakland, CA 94604-1426

19 JPMorgan Chase Bank, National Association¹ ("Movant"), moves this court for an order
20 terminating the automatic stay of 11 U.S.C. § 362 as to Movant, so that Movant may commence
21 and continue all acts necessary to enforce its security interest in real property generally
22 described as 2666 79th Avenue, Oakland, California 94605.

23 On or about July 20, 2011, Zoe Nadine Garlick ("Debtor") filed a voluntary petition
24 under Chapter 7 of the Bankruptcy Code, and John Kendall was appointed as Chapter 7 Trustee.
25 As a result of said filing, certain acts and proceedings against Debtor and the bankruptcy estate
26 are stayed as provided in 11 U.S.C. § 362.

27
28 ¹ This Motion for Relief from Automatic Stay shall not constitute a waiver of the within party's right to receive service pursuant to Fed. R. Civ. P. 4, made applicable to this proceeding by Fed. R. Bankr. P. 7004, notwithstanding Pite Duncan, LLP's participation in this proceeding. Moreover, the within party does not authorize Pite Duncan, LLP, either expressly or impliedly through Pite Duncan, LLP's participation in this proceeding, to act as its agent for purposes of service under Fed. R. Bankr. P. 7004.

1 Movant moves this court for relief from stay under 11 U.S.C. §§ 362(d)(1) and
2 362(d)(2).

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I.**

5
6 **MOVANT IS ENTITLED TO RELIEF FROM THE**
7 **AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(2).**
8 **NO EQUITY**

9 11 U.S.C. § 362(d)(2) provides that relief from the automatic stay shall be granted if the
10 debtor does not have any equity in the property and the property is not necessary to the debtor's
11 effective reorganization.

12 In In re San Clemente Estates, 5 B.R. 605 (Bankr. S.D. Cal. 1980), the court stated that:
13 § 362(d)(2) reflects congressional intent to allow creditors to
14 immediately proceed against the property where the debtor has no
15 equity and it is unnecessary to the reorganization, even where the
16 debtor can provide adequate protection under § 362(d)(1).
17 (Emphasis added).
18 Id. at 610 (emphasis added).

19 In In re Mikole Developers, Inc., 14 B.R. 524, 525 (Bankr. E.D. Pa. 1981), the court
20 stated that in determining whether equity exists in the property for purposes of § 362(d)(2), all
21 encumbrances are totaled, whether or not all the lienholders have joined in the request for relief
22 from stay. The Ninth Circuit has concurred with this view in Stewart v. Gurley, 745 F.2d 1194
23 (9th Cir. 1984).

24 An appropriate cost of sale factor should also be added to determine if the debtor has
25 any equity in the property. La Jolla Mortgage Fund v. Rancho El Cajon Associates, 18 B.R.
26 283, 289 (Bankr. S.D. Cal. 1982).

27 On or about April 26, 2007, Debtor, for valuable consideration, made, executed and
28 delivered to Washington Mutual Bank, FA ("Lender") a Note in the principal sum of
\$203,800.00 (the "Note"). Pursuant to the Note, Debtor is obligated to make monthly principal
and interest payments commencing June 1, 2007, and continuing until May 1, 2037, when all
outstanding amounts are due and payable. The Note provides that, in the event of default, the

1 holder of the Note has the option of declaring all unpaid sums immediately due and payable. A
2 copy of the Note is attached to the Declaration in Support of Motion for Relief From Automatic
3 Stay as exhibit A and incorporated herein by reference.

4 On or about April 26, 2007, the Debtor made, executed and delivered to Lender a Deed
5 of Trust (the "Deed of Trust") granting Lender a security interest in real property commonly
6 described as 2666 79th Avenue, Oakland, California 94605 (the "Real Property"), which is
7 more fully described in the Deed of Trust. The Deed of Trust provides that attorneys' fees and
8 costs incurred as a result of the Debtor's bankruptcy case may be included in the outstanding
9 balance under the Note. The Deed of Trust was recorded on May 7, 2007, in the Official
10 Records of Alameda County, State of California. A copy of the Deed of Trust is attached to the
11 Declaration in Support of Motion for Relief From Automatic Stay as exhibit B and incorporated
12 herein by reference.

13 On or about September 25, 2008, WAMU was closed by the Office of Thrift
14 Supervision and the FDIC was named receiver. As authorized by Section 11(d)(2)(G)(i)(II) of
15 the Federal Deposit Insurance Act, 12 U.S.C. Section 1821(d)(G)(i)(II), the FDIC, as receiver
16 of WAMU, may transfer any asset or liability of WAMU without any approval, assignment, or
17 consent with respect to such transfer. Pursuant to the terms and conditions of a Purchase and
18 Assumption Agreement between the FDIC as receiver of WAMU and Movant dated September
19 25, 2008, Movant acquired certain of the assets, including all loans and all loan commitments of
20 WAMU. As a result, on September 25, 2008, Movant became the owner of the loans and loan
21 commitments of WAMU. A copy of the Affidavit of the FDIC is attached to the Declaration in
22 Support of Motion for Relief From Automatic Stay as exhibit C and incorporated herein by
23 reference.

24 The obligation under the Note is in default as of June 1, 2011, for failure to make
25 payments to Movant. As of July 28, 2011, the principal amount owing under the Note is the
26 approximate sum of \$193,021.47. Further, Movant has incurred additional post-petition
27 attorneys' fees and costs in bringing the instant Motion. This is an approximate amount for
28 purposes of this Motion only, and should not be relied upon as such to pay off the subject loan

1 as interest and additional advances may come due subsequent to the filing of the Motion. An
2 exact payoff amount can be obtained by contacting Movant's counsel. Moreover, the total
3 outstanding payments due under the Note are in the approximate sum of \$3,764.49. An
4 additional payment will come due on September 1, 2011, and on the 1st day of each month
5 thereafter until the Loan is paid in full. A copy of the contractual payment accounting pursuant
6 to Local Rule 4001-1(g)(1) is attached to the Declaration in Support of Motion for Relief From
7 Automatic Stay as exhibit D and incorporated herein by reference.

8 **II.**

9 **RELIEF FROM STAY**

10 **LACK OF EQUITY AND SURRENDER**

11 Movant is informed and believes that, based on the Debtor's bankruptcy Schedules and
12 Statements, the fair market value of the Property is approximately \$150,000.00. A copy of the
13 Debtor's bankruptcy Schedules "A" and "D" are collectively attached to the Declaration in
14 Support of Motion for Relief From Automatic Stay as exhibit E.

15 Based on the above, Movant maintains that the equity in the Property is as follows:

Fair Market Value:	\$150,000.00
Less:	
Movant's Trust Deed	\$193,021.47
First USA's 2nd Deed of Trust	\$156,954.00
Costs of Sale (8%)	<u>\$12,000.00</u>
Equity in the Property:	<u>\$(211,975.47)</u>

20 As a result, there is no equity in the Property for the bankruptcy estate. Moreover, since
21 this is a Chapter 7 proceeding, there is no reorganization in prospect. As a result, Movant is
22 entitled to relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2).

23 Debtor's Statement of Intent indicates it is the intent of the Debtor to surrender the Real
24 Property in full satisfaction of Movant's secured claim. A copy of the Debtor's Statement of
25 Intent is attached hereto as exhibit F.

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27 ///

28 **III.**

MOVANT IS ENTITLED TO RELIEF FROM THE
AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(1).
CAUSE - LACK OF ADEQUATE PROTECTION

Pursuant to the provisions of 11 U.S.C. §§ 361 and 362(d)(1), Movant is entitled to adequate protection of its interest in the Property.

Movant submits that adequate protection in this case requires normal and periodic cash payments, as called for by the Note, plus the repayment of any and all delinquent amounts owed to Movant, including all attorneys' fees and costs incurred in the filing of this motion.

Movant is informed and believes that Debtor is presently unwilling or unable to provide adequate protection to the Movant and there is no probability that adequate protection can be afforded to Movant within a reasonable time.

By reason of the foregoing, Movant is entitled to relief from stay under 11 U.S.C. § 362(d)(1), based upon the failure of Debtor to provide adequate protection to Movant.

WHEREFORE, Movant respectfully prays for an Order of this court as follows:

1. Terminating the automatic stay of 11 U.S.C. § 362, as it applies to the enforcement by Movant of all of its rights in the Real Property under the Note and the Deed of Trust;

2. That the 14-day stay described by Bankruptcy Rule 4001(a)(3) be waived;

3. Granting Movant leave to foreclose on the Real Property and to enforce the security interest under the Note and the Deed of Trust, including any action necessary to obtain possession of the Property;

4. Permitting Movant to offer and provide Debtor with information re: a potential Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan Workout/Loss Mitigation Agreement, and to enter into such agreement with Debtor;

5. Alternatively, in the event this court declines to grant Movant the relief requested above, Movant requests that an Order for adequate protection be issued, requiring the Debtor to reinstate and maintain in a current condition all obligations due under the Note and Deed of Trust and all other deeds of trust encumbering the Real Property, including Debtor's obligations

1 to pay when due (a) the monthly installments of principal and interest, as required under the
2 Note; (b) tax/insurance obligations; and (c) any sums advanced by Movant on behalf of Debtor
3 in order to protect Movant's interest in the Real Property, including all attorneys' fees and costs
4 incurred in the filing of this motion;

5 6. That the attorneys' fees and costs incurred by Movant for filing the instant Motion
6 be included in the outstanding balance of the Note as allowed under applicable non-bankruptcy
7 law; and

8 7. For such other and further relief as the court deems just and proper.

9
10 Dated: October 21, 2011

PITE DUNCAN, LLP

11
12 /s/ ERIN L. LANEY (CA SBN 259863)
13 Attorneys for JPMORGAN CHASE
14 BANK, NATIONAL ASSOCIATION
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